

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: August 30, 2000

TO : Robert H. Miller, Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Sears

Case 20-CA-29444-1

512-5012-6712-6700

512-5012-8300

Arden Fair

Case 20-CA-29444-2

Macerich Property Management Company
Case 20-CA-29636

These cases were submitted for advice as to whether a shopping mall owner, its property manager and/or its tenant violated Section 8(a)(1) by: (1) maintaining impermissible time, place and manner restrictions regarding nonemployee access to the property; (2) ejecting and causing the arrest of nonemployees engaged in area standards handbilling in the interior of the Mall; and (3) threatening to arrest nonemployees engaged in publicity in the interior of the Mall.

FACTS

Arden Fair Mall ("the Mall") is located in Sacramento, California. The owner, Arden Fair, subcontracts with Macerich Property Management Co. ("Macerich") to manage the Mall. The Mall is a large two-story shopping building containing numerous retail and food outlets. Surrounding the Mall on all sides is a private sidewalk that separates the building from the parking lot. A public sidewalk surrounds the exterior of the parking lot. Sears is one of the Mall's key anchor stores that has public entrances from both outside and inside the Mall.

Carpenters Local 586 ("the Union") had a dispute with Wadman Corporation, one of the contractors Sears was using to build a new Sears facility in Roseville, California. According to the Union, Wadman was paying substandard wages and benefits to its employees. The Union engaged in handbilling at three different malls, including Arden Fair Mall, to publicize its dispute with Wadman.

On December 8, 1999,¹ Union representative Brodsky went to the Mall's management office to inquire about the Mall's policy regarding non-commercial speech activity on Mall property. Brodsky was informed that there was no policy. Union representative Foreman approached two individuals dressed in Salvation Army uniforms soliciting donations outside the Mall in front of the entrance to Macy's. Foreman asked one of the individuals if she knew of the Mall's policy for obtaining authorization to solicit at the Mall. The individual said there was no such policy.

On December 16, five Union members passed out leaflets to the public at the Mall. The leaflets urged consumers not to shop at Sears because it uses contractors who pay substandard wages. Three of the handbillers stood at the Sears entrance on the private sidewalk outside the Mall. The remaining two handbillers, Martino and McCartney, passed out leaflets at the interior entrance to Sears in the Mall's common area. After about 10 to 15 minutes, two Sears security guards dressed in street clothes told Martino and McCartney to leave because they were trespassing. One of the guards then called the Mall's security. A Mall security guard arrived and told Martino and McCartney to leave. Martino asked the guards to identify themselves and they refused. At this point, Martino took a photograph of one of the Sears security guards. As Martino attempted to photograph the other guards, the Sears guard who was photographed grabbed Martino's camera. Martino repeatedly demanded that the guard return his camera. During this conversation, the other Sears guard tackled Martino to the ground and held him down while one of the guards handcuffed him. The Mall guard escorted McCartney out of the Mall and the Sears guards took Martino to the security office in the Sears store. The police arrived, one of the Sears guards signed a citizen's arrest for trespass and Martino was then released.

Around 12:30 p.m. the same day, 12 Union representatives picketed on the exterior public sidewalk carrying signs that read "Arden Fair Mall Unfair to Carpenters." They were not asked to leave. During this time, Union representatives Brodsky and Foreman went to the service counter at the Mall where they received an application to request the use of the Mall's common areas for non-commercial speech activity. They also received a copy of a document entitled "Arden Fair Mall Rules for Public Use of Common Areas."

Brodsky and Foreman submitted the application to the service counter several hours later. The application was

¹ All dates are in 1999 unless otherwise indicated.

completed by the Union's attorney and indicated that the Union wished to use the common areas on dates from "12-16-on." Mall General Manager Lytle told Brodsky that the Union's copy of the Rules was missing two pages, including the page that indicated the peak traffic days when all non-commercial activity is prohibited. The dates listed were November 26-28 and December 4-31. Lytle said she did not think the application would be approved.

On December 17, Brodsky asked Lytle about the status of the application. Lytle replied that the Mall was still reviewing the application and would respond directly to the Union's attorney. Lytle said that the Union's application was missing a copy of the handbill the Union planned to use. Brodsky then gave her a copy of the handbill. During the same afternoon, Thomas Leanse, the Mall's attorney, called Union representative Wright and said the Union had to complete an application to handbill on the property. Wright said he had no objection as long as the Mall processed the application in an appropriate amount of time. Leanse told Wright that, "his client did not want [the Union] there at all and that [the Union] would be lucky if the [the Union] got the application approved in two months, and more than likely, it would be disapproved just like they did everyone they didn't want on their property." Wright said he did not think it was in the Mall's best interest to violate the Union's freedom of speech rights. Leanse responded that "he didn't care, he worked by the hour."

On December 21, Brodsky, Foreman, and six other Union members entered the Mall wearing T-shirts that read, "Do Not Patronize Arden Fair Mall Unfair to Carpenters" to protest Leanse's remarks. The group split up and walked in and out of stores purportedly shopping. Several Mall security guards approached Brodsky and told him to take off his shirt because he was offending the customers. The guards asked Brodsky two more times to leave or else they would have him arrested. They handed Brodsky a complete application packet, including the two pages that were missing in the original packet he received. The guards followed Brodsky and Foreman and videotaped them until they left the Mall.

On December 22, Brodsky, Wright and about 45 members from the Union walked around the Mall purportedly shopping in the stores wearing the same T-shirts as the previous day. The security guards followed and threatened the group as they had the day before. The group left when the police arrived. At some point during the day, the Union's attorney received a letter from the Mall which rejected the Union's application for the following reasons: the application was untimely; the copy of the handbill provided to the Mall was not legible; the application was incomplete and ambiguous

because the application requested to use the Mall for 12-16-on;² the application did not include the requisite deposit and/or indemnity agreement for leafletting; the application did not list the specific names of all persons who were going to participate in the leafletting activity; it was not clear whether the application was signed by an authorized representative because it listed Brodsky as its representative but was signed by the Union's attorney; and the application failed to identify the Union's preferred designated areas in order of preference. The Mall's letter stated that it was rejecting the application because of the asserted deficiencies, and not denying or approving it.

ACTION

We conclude that complaint should issue, absent settlement, alleging that Arden Fair and/or Macerich violated Section 8(a)(1) by maintaining impermissible time, place and manner restrictions and that Arden Fair, Macerich and/or Sears violated the Act by ejecting nonemployees engaged in handbilling in the interior of the Mall on December 16. We also conclude that complaint should not issue on the allegation that Arden Fair and/or Macerich threatened nonemployees who were engaged in publicity activities in the interior of the Mall on December 21 and 22.

In Lechmere, Inc. v. NLRB,³ the Court held that, except in narrow circumstances, "Section 7 guarantees do not authorize trespasses by nonemployee organizers." (Emphasis supplied.) However, an employer violates Section 8(a)(1) if it interferes with nontrespassory Section 7 activity. Thus, as a threshold matter, in order to assert a Lechmere privilege, an employer must have a property interest sufficient to make the union's presence on the property a "trespass."⁴ Since it is well established that property rights are created by state rather than federal law, we must look to the law of the State of California to determine the nature and extent of Arden Fair's property interest.

² The Mall Rules only permit a request for up to three consecutive days per application.

³ 502 U.S. 527, 537, 112 S.Ct. 841, 848 (1992).

⁴ See, e.g., Bristol Farms, 311 NLRB 437, 438-439 (1993); Johnson & Hardin Co., 305 NLRB 690 (1991), enfd. in pertinent part 49 F.3d 237 (6th Cir. 1995).

1. Property interests under California law

Under California law, two independent foundations act to limit the property interest in public spaces owned by private shopping centers: state constitutional freedom of speech guarantees⁵ and state labor law and policy.⁶ A private shopping center cannot exclude a union or others entirely from its premises, but may condition access to its property pursuant to lawful time, place and manner restrictions.⁷ Such restrictions are lawful to the extent they do not seek to regulate the content of the speech; are narrowly tailored to serve significant interests; and leave open ample alternative channels for communication of the information.⁸

According to the principles set forth in Pruneyard, a private shopping center cannot exclude a union entirely from the common interior areas of the mall. In GM Pension Trust Fund/Hilltop Mall,⁹ we applied California state

⁵ Robins v. Pruneyard, 153 Cal.Rptr. 854 (1979), affd. 447 U.S. 74 (1980). The Court in Pruneyard relied on Schwartz-Torrance v. Bakery & Con. Workers Union, 40 Cal. Rptr. 233 (1964) and In re Lane, 79 Cal. Rptr. 729 (1969) to establish the scope of state constitutional free speech guarantees.

⁶ Sears v. San Diego District Council of Carpenters, 158 Cal.Rptr. 370 (1979), cert. denied 447 U.S. 935 (1980). In Sears, the court interpreted the scope of the Moscone Act and concluded that the principles that had emerged under California law at the time of the enactment of the Moscone Act had been codified into California labor statutes. Prior to the enactment of the Moscone Act, Schwartz-Torrance and In re Lane had established the legality of peaceful union picketing on private sidewalks outside a store. See also In re Catalano, 171 Cal.Rptr. 667 (1981).

⁷ Pruneyard, 153 Cal.Rptr. at 859-860.

⁸ See Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 648 (1981), quoting Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 536 (1980); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), quoting Clark v. Community for Creative Non-Violence, 485 U.S. 288, 293 (1994); Planned Parenthood Shasta-Diablo, Inc. v. William, 30 Cal.Rptr.2d 629, 634 (1994), vacated 513 U.S. 956.

constitutional free speech guarantees to the interior common areas of a privately owned shopping center. We determined that two enclosed shopping centers did not possess a property interest sufficient to exclude nonemployee handbillers from the interior areas of the mall.¹⁰ Similarly, Arden Fair, the large shopping complex here, does not possess a property interest sufficient to exclude the Union entirely from the interior of the Mall as a matter of state constitutional free speech guarantees.

2. Time, Place and Manner Restrictions

We conclude that Arden Fair and/or Macerich violated Section 8(a)(1) by maintaining certain unconstitutional time, place and manner restrictions that unlawfully coerce Section 7 rights. The Mall Rules prohibit the use of signs, leaflets, and other written materials that "interfere with the commercial purpose of the Center or its tenants." A similar prohibition on materials in H-CHH Associates v. Citizens for Representative Government,¹¹ allowing shopping center management to reject activity that would "adversely affect the shopping center environment, atmosphere or image" was found unlawful. The court stated that any procedure that "confers such unbounded discretion permits a decision to be made impermissibly on the content of expression."¹² The prohibition in the instant case is similar to the one found unlawful in H-CHH in that it also permits the mall to reject materials based on their content.¹³

⁹ Case 32-CA-17318, Advice Memorandum dated July 1, 1999.

¹⁰ Id. at 11. We also noted that it was best for the courts to determine whether Section 7 activity was permitted in the *interior* areas of the mall as a matter of state labor policy, separate and apart from constitutional grounds. Indeed, the labor policy cases upon which the Sears/Moscone Act principles rely only involve activity on the *exterior* premises of an employer's private property. Id.

¹¹ 238 Cal.Rptr. 841, 852 (Cal.App. 2 Dist. 1987), cert. denied 485 U.S. 971 (1988).

¹² Id. at 852 (citing Dillon v. Municipal Court, 4 Cal.3d 860, 869-870 (1971)).

¹³ We also note that such prohibition is similar to the unlawful prohibition on "Do Not Patronize" messages in Fashion Valley Shopping Center, Case 21-CA-33004, Advice Memorandum dated April 30, 1999. We determined that the prohibition in that case, as in H-CHH, afford the shopping

Furthermore, the Rules require that an applicant attach to the application copies of any written material it wishes to use. Prior approval of written materials is permissible only if the review of the materials is limited to objective considerations.¹⁴ In UNITE, the court noted that the review of signs in that case was lawful because the review was limited to those objective considerations reinforced by the court in H-CHH. Those considerations included "compatibility with the general aesthetics of the mall, neatness, and the prohibition on the use of fighting words, obscenities, grisly or gruesome displays or highly inflammatory slogans likely to provoke disturbances."¹⁵ However, as noted above, the prohibition on materials that interfere with the Mall's commercial purpose is an impermissible content based restriction. Thus, the review of materials is not limited to objective considerations and the rule requiring prior submission of materials is, therefore, unlawful.¹⁶

The Rules also require that the Union disclose in the application the names of all participants in the activity. We concluded that an identical disclosure requirement was unconstitutional in Fashion Valley Shopping Center.¹⁷ In addition to concluding that the shopping center had sufficient information to assess the risks of the activity without the identities of individual handbillers, we noted

center the power to deny access based solely on the message that the union wishes to convey.

¹⁴ The court in Union of Needletrades, Indus. & Textile Employees v. Superior Court (Taubman Co.), 65 Cal.Rptr.2d 838, 850 (Cal.App. 2 Dist. 1997) ("UNITE"), stated with respect to prior submission of materials, "[w]e see no constitutional impediment to that requirement. Implicit in the right of the mall to regulate the content and style of the signs is the ability to review the signs and reject those which do not meet its *objective standards*." (Emphasis added.)

¹⁵ Id. at 850.

¹⁶ See also Santa Ana Venture and Urban Retail, 21-CA-31712, Advice Memorandum dated January 31, 1997, where we concluded that the mall's time, place and manner restrictions were overly restrictive of Section 7 rights, noting that the mall required prior approval of distributed materials.

¹⁷ Fashion Valley Shopping Center, *supra* note 13, p. 10.

various Supreme Court decisions finding similar requirements unconstitutional.¹⁸ Therefore, the same disclosure requirement in the instant case is unlawful.

Also prohibited by the Rules are activities that identify by name the shopping center owner, manager, or any tenant. In Urban Retail, we concluded that the same prohibition on identification of any tenant was unlawful. In that case, we determined that the mall's rules governing time, place and manner of access were overly restrictive of Section 7 rights, specifically noting that "the Mall . . . bars any identification of the Mall or its tenants."¹⁹ Accordingly, we agree with the Region that the same prohibition in the instant case is unlawful.

The Rules state that activity may only be conducted in several designated interior areas and "are not allowed at any other location, including driveways and parking lots." Although this rule involving activity in exterior areas was not enforced against the Union in this case, the maintenance of such a rule is unlawful. Indeed, the explicit ban on the driveways and parking lots, in conjunction with the failure to identify the exterior sidewalk as a designated area, effects a complete ban on access to the exterior areas of the Mall. Although Arden Fair may restrict handbilling to designated areas,²⁰ a complete ban on access to the exterior areas of the property is unlawful. According to the principles set forth in Pruneyard, a shopping center owner does not have a property interest sufficient to exclude expressive activity entirely from its exterior property. Thus, a complete prohibition on access to the exterior areas is unlawful.²¹

¹⁸ See Talley v. California, 362 U.S. 60 (1960), where the Court struck down a Los Angeles city ordinance that prohibited public distribution of all handbills unless they bore on their face the name and address of the author, publisher and distributor. The Court held that the right of free speech necessarily includes the right to remain anonymous. See also McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995), where the Court struck down Ohio's prohibition against the distribution of anonymous political campaign literature.

¹⁹ Urban Retail, *supra* note 16, p. 5.

²⁰ See H-CHH Associates, 238 Cal.Rptr. at 853; GM Pension Trust Fund/Hilltop Mall, *supra* note 9.

We also note that the rules prohibit participants from "carrying or wearing signs, posters, or placards." Such a rule is overbroad and unlawfully coerces Section 7 rights in that it bans all picketing. A complete ban on picketing prohibits individuals from engaging in lawful primary picketing.²² In UNITE, the union sought access to six different malls to engage in handbilling and picketing inside the shopping centers. Each mall conditioned access to its property based on lawful time, place and manner restrictions. The court in UNITE declined to enjoin the malls from enforcing the rules against the handbilling and picketing activity.²³ Thus, the failure of the court to make a distinction between picketing and handbilling suggests that both activities are treated the same under California law. Therefore, picketing may be subject to lawful time, place and manner restrictions, but a complete ban on picketing is unlawful.

3. Ejection and Arrest on December 16

We conclude that the ejection of both nonemployee handbillers from the common area and the arrest of one handbiller on December 16 were unlawful. As previously noted, the handbilling took place during one of the "peak traffic days" in which all non-commercial activity is prohibited. Nevertheless, Arden Fair and Macerich were not entitled, under these circumstances, to exclude the handbillers from the Mall for handbilling on a peak traffic day when they had no notice of the restrictions. Furthermore, the Mall was not entitled to exclude the handbillers for failing to apply for a permit as required by the Mall Rules.

In some cases, a shopping center owner may be entitled to exclude individuals from the property during a valid blackout period. For instance, in H-CHH, a political association sought permission to engage in leafletting and

²¹ See Bristol Farms, 311 NLRB at 43 ("an employer's exclusion of union representatives from private property as to which the employer lacks a property right entitling it to exclude individuals . . . violates Section 8(a)(1)").

²² See Mega Van & Storage, 294 NLRB 975, 977 (1989); H.W. Barss Co., 296 NLRB 1286, 1287 (1989), where the Board stated that "the union's picketing was in protest of substandard wages and was therefore primary picketing protected by Section 7 of the Act."

²³ 65 Cal.Rptr.2d at 856.

petitioning on mall property. About a week before Christmas, a member of the association approached the mall manager expressing the association's desire to engage in the activity. The mall manager gave the member a set of the mall rules and advised the member that their activity would not be permitted during the Christmas season. The association member informed the manager that the association would appear two days before Christmas. The mall obtained a temporary restraining order and preliminary injunction against the association enjoining their activity until they complied with the mall rules. The appellate court reversed the order granting the preliminary injunction since a significant portion of the rules was unconstitutional. However, the court held that the granting of the temporary restraining order was justified "to the extent it enforced the Christmas holiday ban on petitioning activity."²⁴

In GM Pension Trust Fund/Hilltop Mall, nonemployees engaged in handbilling on the Friday after the Thanksgiving holiday inside a shopping mall. The mall manager approached the handbillers and informed them that they were handbilling on a blackout day in which no activity was permitted. The manager also handed the handbillers a set of the mall rules. We determined in that case that the mall rules were lawful as reasonable time, place and manner restrictions. Thus, the handbillers were lawfully excluded for failing to apply for a permit and for handbilling on a valid blackout date.²⁵

Although the shopping centers in H-CHH and GM Pension Trust Fund/Hilltop Mall were entitled to exclude individuals from the malls during the blackout periods, the instant case is distinguishable. In both of the above cases, the mall manager informed the groups of the blackout date in addition to providing them with a copy of the rules. In the instant case, the handbillers were never told about the Mall Rules or the ban on activity during the holiday season, before or at the time they were ejected. In fact, prior to engaging in any activity, Union representative Brodsky went to the Mall's management office and inquired as to the Mall's policy regarding non-commercial speech. Brodsky was told

²⁴ 193 Cal.App.3d at 1220. The court found that due to the high degree of congestion during the Christmas holiday period, the lower court was justified in enforcing the holiday ban on activity because "[p]laintiffs had the right and responsibility to keep the courtyard area open and available for movement." Id.

²⁵ GM Pension Trust Fund/Hilltop Mall, *supra* note 9, p. 10.

there was no policy. Furthermore, once the handbilling began on December 16, the handbillers were only told to leave because they were trespassing; there was still no mention of the blackout rule.²⁶ Thus, since the handbillers had no notice of the blackout rule prior to or during the handbilling activity, the Mall was not entitled to exclude the handbillers from an area where they had a right to be under California law. Significantly, the Mall did not mention the blackout period as a justification for its December 16 conduct.

Moreover, the Mall was not entitled to exclude the handbillers for failing to apply for a permit as required by the Mall Rules. As previously discussed, a number of the Mall Rules are unconstitutional and overly restrictive of Section 7 rights. In Fashion Valley Shopping Center, the union engaged in handbilling on mall property without applying for a permit as required by the mall rules. The application process included an unconstitutional prohibition on "Do Not Patronize" messages and a requirement that the union name all handbillers. We determined that the exclusion of a union for refusing to agree to such impermissible restrictions is unlawful.²⁷ Similarly, the failure of the Union to apply for a permit in the instant case is excused. Indeed, the Union is not required to comply with an application process that would subject it to the impermissible restrictions previously discussed. Therefore, the December 16 exclusion of the handbillers based on the failure to apply violated Section 8(a)(1).

Aside from the blackout rule and the impermissible restrictions, we note that Sears unlawfully excluded the handbillers from the common areas of the Mall. Indeed, Sears is merely a tenant of the Mall and there is no evidence that it possesses a property interest sufficient to exclude the handbillers from the interior common areas of the Mall.²⁸

4. Threats to Arrest on December 21 and 22

²⁶ We note that the Union's first copy of the Rules, obtained later that day, did not even contain the page that listed the blackout dates.

²⁷ Fashion Valley, *supra* note 13, p. 12.

²⁸ See Bristol Farms, *supra* note 21. In fact, it appears that Sears viewed its own property interest as insufficient because the handbillers were not forced to leave until after Sears summoned the Mall's own security.

We further conclude that the December 21 and 22 threats to arrest Union members wearing T-shirts that urged a consumer boycott of the Mall were lawful. Indeed, at that point the Union was aware of the blackout period as a rule to be complied with apart from the application process. As previously noted, the Union received a copy of the Mall Rules and an application on December 16. Although their first copy of the Rules did not contain the blackout dates, such dates were orally communicated to the Union by the Mall Manager after it completed the application. In addition, the Union was given a full copy of the Rules when it was told to leave the Mall on December 21. Thus, the valid rule regarding the peak traffic days had been communicated to the Union prior to the date it began the activity, and again when it was given a copy of the Rules after the activity began. Therefore, the Mall was entitled to exclude the Union from the Mall during the blackout period and any threats to arrest handbillers if they did not leave were lawful.²⁹ Furthermore, we note that any exclusion of the handbillers to the extent their activity was conducted inside the stores would be lawful.³⁰

Accordingly, the Region should issue complaint, absent settlement, alleging that Arden Fair and/or Macerich violated Section 8(a)(1) by maintaining impermissible time, place and manner restrictions, and that Arden Fair, Macerich and/or Sears unlawfully ejected nonemployee handbillers from Mall property on December 16 and unlawfully caused the arrest of one handbiller. The Region should not proceed on allegations involving the December 21 and 22 conduct or other rules not specifically found unlawful in this memorandum.

B.J.K.

²⁹ See H-CHH Associates, 238 Cal.Rptr. at 853; GM Pension Trust Fund/Hilltop Mall, *supra* note 9.

³⁰ See GM Pension Trust Fund/Hilltop Mall, *supra* note 9, where we concluded that the removal of union handbillers from a retail store inside the mall was lawful. We determined that the store itself was not a public forum under Pruneyard. *Id.* at 12.